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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 308

THADDEUS G. BENTON AND J. LAMAR BUTLER,
Petitioners,

v.

GLENN McCARTHY, GLENN McCARTHY, INC., AND
WILLIAM McCARTHY, *Respondents.*

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Your petitioners respectfully pray a rehearing by the Court of their petition for a writ of certiorari, on the following grounds:

1. The District Court and the United States Court of Appeals struck down and ignored the Constitutional requirement, implemented by the United States Statute (28 U.S.C., sec. 1652) and the decisions of this Court in *Erie* v. *Tompkins* and successive decisions by

completely ignoring the controlling New York and Texas rules of decision determinative of the rights of the parties, and by substituting their personal philosophy as to what the law should be in commercial transactions, in plain disregard of the law announced in the 18 decisions of this Court, the U. S. Court of Appeals for the Second Circuit, the Court of Appeals of New York and the high courts of Texas. (See petition for the writ, pp. 22-30). Based alone on the findings of the Court of Appeals in its interpretation of the findings of the District Court, the law compels the reversal of the judgment below and a new trial based on the correct rule of law to be re-announced by this Court, in which new trial the true credibility of the evidence will be known by the trial court.

2. The decision of the Court of Appeals is in direct conflict with the 18 decisions cited by petitioners, and for that reason also the writ should issue.

3. Petitioners were not granted a fair trial inasmuch as the findings of the trial court were induced by critically false testimony of William McCarthy, and false representations to the Court by Leo B. Mittelman, defendants' trial counsel, who were in fact *at that time* guilty of felonies as proved by their subsequent convictions, and by the perjurious testimony of Glenn McCarthy. Proper weight of their testimony and declarations to the court has, therefore, never been taken into account, although the Court of Appeals found that petitioners had demonstrated "the conflicting nature of the testimony" for which reason "we find no reason to disturb his resolution of the conflict in favor of defendants". Hence the sufficiency of the *real evidence* (the truly credible evidence, remaining after the proper impeachment of William McCarthy and Leo B. Mittel-

man) was not and could not have been considered by the Court of Appeals as required by FRCP 52 (b), or by the trial court.

4. Unless the Court issues the writ, if only for determination solely of the legal and constitutional question presented, based on the findings of the Court of Appeals, and orders a new trial, petitioners will suffer the loss of hundreds of thousands of well earned dollars, and by reason of a simple, but monumental travesty upon the law by the lower courts, in violation of Constitutional principles.

5. In the prosecution of the petition for the writ, the undersigned attorney has had the counsel and support of nine other attorneys of high standing, of whom the names of seven have appeared on the papers in this Court. Some have served as friends of the law, without expectation of compensation.

CONCLUSION

It is therefore respectfully urged that the principles involved by the wrongful decisions below are of such grave nature and would have such a devastating effect upon the principle of *stare decisis*, in the administration of the law in the United States, and further confusion, that the Court should grant the writ.

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CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is presented in good faith and not for delay.

The grounds for the petition for rehearing are substantial grounds available to petitioner, although not previously presented as here, as they are limited to the request that the Court review only the faulty legal conclusion of the Court of Appeals and the District Court, involving the denial of petitioners' Constitutional rights, which, when done, would require the remand of the action for a new trial in accordance with the law as announced by this Court; the review would not involve a review of the fact determinations of either lower court. Such denial of Constitutional rights was presented in the petition for the writ, which asked the whole review of the judgments below. So that the Court is now asked to review only the Constitutional question, and not the subsidiary questions involving fact findings,—all based on the Court of Appeals' recital of the controlling facts. The petition is thus restricted to the grounds aforesaid, in the belief that they are within the meaning of Rule 58 of the Court.

THADDEUS G. BENTON